(5)

No. 96-~~1740~~ 1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CATERPILLAR INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE CENTER ON NATIONAL LABOR POLICY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER CATERPILLAR INC.

MICHAEL E. AVAKIAN*
CENTER ON NATIONAL
LABOR POLICY, INC.
5211 Port Royal Road, Suite 103
North Springfield, VA 22151
(703) 321-9180

Attorney for Amicus Curiae
**Counsel of Record*

---

24 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

LEGISLATIVE HISTORY

STATUTES

No. 96-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CATERPILLAR INC.,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786,

Respondents.

BRIEF OF THE CENTER ON NATIONAL LABOR POLICY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER CATERPILLAR INC.

INTRODUCTION

Pursuant to Supreme Court Rule 37.2(a), the Center on National Labor Policy, Inc. ("Center") submits this brief *amicus curiae* in support of the Petitioner. All parties have given written consent to the filing of this Brief.[1]

INTEREST OF THE *AMICUS CURIAE*

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitu-

---

[1]Letters of consent have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

tional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in other cases before the Court, including, *International Union, United Mine Workers v. Bagwell*, No. 92-1625; *Riesbeck Food Markets, Inc. v. UFCW, Local 23*, No. 91-15; *Lehnert v. Ferris Faculty Assn., No. 89-1217; Koons Ford of Annapolis, Inc. v. NLRB*, No. 87-1305; *Breen v. ILGWU*, No. 83-1791; *Archie E. Brown v. FEC*, No. 81-1905; *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council, No. 80-1257*; and *New York Telephone Co. v. N.Y.S. Dept. of Labor, No. 77-961*.

The parties to the instant case will primarily focus on important structural aspects of the Section 302(c)(1) restriction on the transfer of anything of financial value from an employer to a labor union official. Equally important, however, is the underlying conceptual question that the payment of "wages" to a former employee who performs no contemporaneous work for the employer can be a properly bargained-for transfer of employee resources approved by all employees in the bargaining unit.

The Center's primary interest in presenting the public interest where pressure groups attempt to affect the nation's welfare through illegal action is at stake here. However, beyond the narrow issues appearing in the Center's mandate, the Center has an interest in the integrity of the courts and in both lawful and peaceful societal behavior that protects the guaranteed option of employees and employers not to associate or be taxed for paying wages for the profit of union officials. This interest is directly challenged by the Respondents' efforts to procure payments to subsidize their parochial activities at the expense of securing better wages and benefits for all working employees in the bargaining unit, union and non-union alike.

The Center does not doubt that Petitioner will fully argue its interests here. However, because the interest of Caterpillar Inc. ("Caterpillar" or "Petitioner") in avoiding contractual liability on the basis of the Labor Act or upon yet to be agreed to terms of any settlement agreement between it and the International Union, United Automobile Workers ("Union" or "UAW"), does not in itself include the interests of the employees, that interest is at risk.[2]

Likewise, the Center does not doubt that Respondent Unions will fully argue their interests -- *e.g.*, to continue to receive employer wage payments as union officials -- in this case. However, because the interest in collecting these payments naturally focuses upon the act of bargaining and the union's self-interest in its internal affairs, the broader public interest in ensuring independent unions and the prevention of collusion and corruption is potentially compromised.

The Center respectfully submits that it is in a unique position to fully advocate the rights of the public and those individuals who have suffered from the actions of Respondents in the past and those whose earned wages were affected because of the decisionmaking of private parties in which they could not participate. *See Price v. UAW*, 621 F. Supp. 1243 (D. Conn. 1985), *aff'd*, 795 F.2d 1128 (2d Cir. 1986), *vacated*, 487 U.S. 1229 (1988); *on remand*, 722 F. Supp. 933 (D. Conn. 1989), *aff'd*, 927 F.2d 88 (2d Cir. 1991), *cert. denied*, 502 U.S. 905 (1991).

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

---

[2]*See North Bay Development Disabilities Services, Inc. v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), *enf'g*, 287 N.L.R.B. 1223 (1988), *cert. denied*, 498 U.S. 1082 (1991) (employer cannot articulate non-union employee interests in ascertaining germane collective bargaining expenses during collective bargaining over an agency shop provision).

QUESTION PRESENTED

Whether the anti-corruption provision of Section 302(c)(1) of the National Labor Relations Act, 29 U.S.C. § 186(c)(1), forbids an employer from agreeing to make payments to former employees on leave as union officials because this is a form of "featherbedding" prohibited by § 8(b)(6) of the Act and because there can be no legal fiction that objecting non-union employees of the employer agreed to exchange a portion of their wages and benefits to these union officials in past collective bargaining agreements to which they had no vote.

STATEMENT OF THE CASE

This case arises on a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. *Caterpillar Inc. v. International Union, United Automobile Workers, et al.*, 107 F.3d 1052 (3d Cir. 1997), *rev'g*, 909 F. Supp. 254 (M.D. Pa. 1995).

STATEMENT OF FACTS

Caterpillar and the Union had been parties to a series of collective bargaining agreements. For several terms, Caterpillar agreed to pay the wages of two groups of "employees" who became elected officials of the Union. One group continued to perform work in its plants as grievencemen and stewards and the second group became full-time union officers and no longer performed any services for Caterpillar.

In 1992, Caterpillar informed the UAW that it would not agree to pay the wages and benefits of union officials not performing any employer work. After a union strike that began in April 1992, in which the UAW had rejected the employer's contract demands, the union employees agreed to return to work. The union then demanded reinstitution of full-time union officer wages from Caterpillar and an increase thereto. To date, Caterpillar and the UAW have yet to reach an agreement.

Caterpillar filed a suit for declaratory judgment in the United States District Court for the Middle District of Pennsylvania to declare the payment of money to full-time union officials under these circumstances violated the Act. The case was initially stayed to permit the National Labor Relations Board to consider the question. An administrative law judge found the payments "raise a serious issue under Section 302" and were "facially violative of Sections 8(a)(3) and 8(b)(2)." App. at 81a-82a.[3]

The District Court lifted the stay and agreed that the payment of wages and benefits was not exempted by the restrictions placed on Section 302(c)(1) and granted Caterpillar's request for declaratory relief. The Third Circuit, sitting *en banc*, reversed in a 9-3 opinion. The majority of the Court disagreed with the district court and overturned long-standing law in the circuit to do so: *Trailways Lines, Inc. v. Trailways Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986).

The remaining facts of this case are set out by Petitioner Caterpillar Inc. in its brief and are adopted here.

SUMMARY OF ARGUMENT

Until the decision in this case, the Circuit Courts have been in general agreement that Congress had intended for employer money be kept completely out of the pockets of labor organizations and labor union officials. The amendments to the Labor Act in 1947 were specifically introduced to prohibit featherbedding, extortion, payoffs, and subterfuge that distracts union officials from representing workers fairly.

The decision of the Third Circuit conflicts with the statutory purpose of Sections 302(c)(1) and 8(b)(6) of the Labor Act. The Third Circuit's explanation that payments to full-time union officials are permitted "by reason of" their former service to the employer is an anomalous concept. Those former employees were already

---

[3] "App." references are to the Appendix to the Petition for Writ of Certiorari.

paid once for their work. To suggest that a demand for an additional $50,000.00 per year per official, 79a, is simply a mere portion of the pooled value of compensation they might have shared with other workers as a working employee of Caterpillar in some past period, is ludicrous.

The Third Circuit's construct that all workers agreed in past negotiations for the opportunity/possibility to receive this benefit as a union official in the future, is not supported. Simply put, the Union is but a majority representative. Not all of Caterpillar's workers had an opportunity to vote on the contracts to give the union officials the wages and benefits they now seek to secure from the federal courts. The Third Circuit's reasoning is faulty.

Non-member employee agency fee payers under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), have no right to vote on union contracts or become union officers. Therefore to ever share in the gratuity the Third Circuit states was given to full-time union officials with all-employee consent is a legal fiction with no support in the caselaw or the record. The decision portends an evasion of union responsibility to provide agency fee payers with proper evidence of union expenses germane to collective bargaining and not force them to share a greater institutional supporting role for the union organization then voluntary members would otherwise have to assume. *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963).

These payments to full-time union officials are simply a method of "featherbedding" prohibited by Section 8(b)(6) of the Act. The payments are not made for any contemporaneous services or work performed for the benefit of the employer. It is admitted that the union officials receiving these payments perform no services or work for the employer's benefit and on this record are considered employees of the Union, not of Caterpillar. App. 7a.

Under these circumstances, the Third Circuit's reliance upon the "by reason of" language in Section 302(b) is to no avail. That language was used by Congress to permit certain employer payments for work-related activities such as rest periods and safety

patrols. Although not directly enhancing an employer product, these activities relate to work that actually was performed by workers while under the employer's supervision. This Court has interpreted Section 8(b)(6) as requiring that compensation may be given only for work actually performed by the worker. *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100 (1953).

Here, the Third Circuit does not relate its authorization to any services the full-time union official would render to Caterpillar. On that account, it would be an illegal payment under Section 302(a) and the receipt would be illegal under Section 302(b). Moreover, for the union to articulate a desire to force the employer to consider making payments to the Union's own employees, during bargaining is "garden variety" featherbedding prohibited by Section 8(b)(6).

For these reasons, this Court must find that the Third Circuit failed to properly exercise lawful and appropriate supervision of union activities under the Labor Act. If permitted to stand, the case will be a model for stripping the heart out of the legislative purpose to maintain union independence by keeping union hands out of employer pockets.

REASONS FOR GRANTING THE PETITION

I. THE ANTI-BRIBERY AND FEATHERBEDDING PROVISIONS OF THE LABOR ACT DO NOT SHIELD UNLAWFUL TRANSACTIONS SIMPLY BY SETTING THEM FORTH IN A BARGAINING AGREEMENT.

This Court's Labor jurisprudence has long recognized the existence of an inimical conflict to free and open collective bargaining by the opportunity for corruption where an employer is permitted to pay to a union or union officials money to promote or underwrite union activity. *Arroyo v. United States*, 359 U.S. 419, 425 (1959). The Court considered the legislative history of Section 302 of the Labor Act in that case, and observed Senator Taft's statement on the Senate floor that the statute "was intended to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Id.* at 426 n.8.

In this light, the statutory prohibition against payment of any direct or indirect "wages" and benefits to labor union officials becomes clear. 29 U.S.C. § 186(a)(1) makes it illegal for an employer "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—(1) to any representative or any of his employees," except when made to an "officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer...." 29 U.S.C. § 186(c)(1).

Since the intent of the Congress was to prevent the "shake-down" of employers by labor organizations, the legislative intent extended to all forms of "shake-downs," extortion or blackmail. The short version of the Third Circuit's elucidation of the law is that these very same actions may be accomplished as long as the union puts the deed in writing.

But nowhere in the Third Circuit opinion is there any accommodation for the Labor Act's prohibition on featherbedding contained in Section 8(b)(6) of the Act, 29 U.S.C. § 158(b)(6). This section of the Labor Act makes it unlawful for a union:

> to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

With this section of the statute in mind, the exception in section 302(c)(1) that would draw the line against payments to former employees who are union officials becomes clearer. The Court below endeavored to rest its approval of compulsory bargaining on this union plan to receive "wages" based on the "by reason of, his service as an employee of such employer" language of the statute, 107 F.3d 1056, because,

> We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the

> payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself. Caterpillar was willing to put that costly benefit on the table, which strongly implies that the employees had to give up something in the bargaining process that they otherwise could have received. Thus, every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.

The premise of the court's conclusion that the "shake-down" or "back-door deal" can't happen when put in a written agreement fails to account for the Section 8(b)(6) restriction that wage payments are only allowed to employees for services that are "performed" for the employer. Non-wage payments to third persons might be for consulting or other business purposes related to the employer's charter, but here the payments are not for any services rendered for the employer.

As hard as the Third Circuit tries to validate the parties former scheme of paying "wages" to union officials "by reason of" former work where payment was in fact tendered, the Congress has already stated that this type of featherbedding, by contract rather than subterfuge, remains unlawful. The decision below poses a direct threat to the very collusion and corruption that labor organizations have heretofore been prevented from seeking outright. There is no room in the interpretation of the Labor Act that would permit the emasculation of the legislature's intent in this manner.

As the House Report on Section 8(a)(6) reflects, the purpose of the Act was to prevent practices that "requires employers to hire people who do no work, to pay for people the employers do not hire, and to hire more people than the employers have work for." H.R. No. 245, 80th Cong. 1st Sess., at 25, *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 316 (1948).

A major portion of the legislative history underscores the legislative objection to activities of J. Ceasar Petrillo, who as President of the American Federation of Musicians, forced employers to hire union personnel and pay them while performing no services for the employer. *Id.* The debates reflect as well, the problem that is in issue at bar. For instance, Rep. Land, one of three managers on the part of the House in the Conference Committee, stated:

> No employer should be required to hire more help than necessary. Ceasar Petrillo, the czar of the musicians' union decided that our American children must not participate in a musical program over the radio network of this Nation unless the station or sponsor was willing to pay union musicians to do nothing else but stand by in the studio during the children's program. Thus, the children in 200,000 rural schools in the United States are denied the opportunity to learn to play musical instruments by the dictates of one man—Petrillo.

93 Cong. Rec. A1295 (Mar 24, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 584 (1948).

Mr. Landis further explained three months later that the provision was to "make it a violation of the law for a union to try to compel an employer to pay its members for services not performed." 93 Cong. Rec. A2824 (June 20, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 917 (1948).

Senator Taft discussed the intent of the conference committee report and the differences with the House version of the bill on June 5, 1947. In one exchange with Senator Pepper, Senator Taft explained that the Section 8(b)(6) language was to establish a prohibition "in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept." 93 Cong. Rec. 6603 (June 5, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1545 (1948).

In a Senate analysis submitted into the Senate record by Mr. Taft, the Senate conferees showed that the House had defined featherbedding practices to include: "(a) Agreeing to employ persons in excess of the number reasonably required, (b) paying money in lieu of employing such an excess number of persons, (c) paying more than once for services performed, (d) paying money for services not performed, and (e) paying a tax for the privilege of using certain articles or operating certain machines or agreeing to restrictions upon their use." 93 Cong. Rec. 6601 (June 5, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1540 (1948).

On June 12, 1947, Senator Taft submitted a supplementary analysis of the bill to address concerns raised by the Senate. In explaining proposed Section 8(b)(6), that Report explained:

> It has also been stated that it would be a breach of this section for employees who are asked to report for work so as to be available as a relief squad in the event of emergency or need, to demand any money for their time. Of course this section does not affect such industrial practices, as such activities are *done at an employer's request* and for valuable consideration incident to the employment itself. The use of the words "in the nature of an exaction" make it quite clear that *what is prohibited is extortion by labor organizations or their agents in lieu of providing services which an employer does not want.*

93 Cong. Rec. 7001 (June 12, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1624 (1948) (emphasis added).

Because the constitutionality of the Lea Act forbidding featherbedding under the Communications Act was pending in this Court in *United States v. Petrillo*, 332 U.S. 1 (June 23, 1947), at the time of the debate, the Senate conferees were wary of making the changes, yet agreed to the House bill with one change. 93 Cong. Rec. 6693 (June 6, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT,

1947, at 1540 (1948). Subsequently, in *Petrillo*, this Court held that the criminal information against Petrillo was valid.

The President's intervening Veto message to the Congress stated that he saw the following problem with the approved featherbedding prohibition:

> 2. The bill arbitrarily decides, against the workers, certain issues which are normally the subject of collective bargaining, and thus restricts the area of voluntary agreement.
> (3) The bill presents the danger that employers and employees might be prohibited from agreeing on safety provisions, rest-period rules, and many other legitimate practices, since such practices may fall under the language defining "featherbedding."

93 Cong. Rec. 7500 (June 20, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 916-17 (1948).

On June 23, 1947, Senator Ball explained that the provision applied "only to situations, for instance, where the Musicians' Federation forces an employer to hire one orchestra and then to pay for another stand-by orchestra, which does no work at all." 93 Cong. Rec. 7683 (June 23, 1947), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1639. (1948). The President's veto was overridden that same day. *Id.* at 1656.

Rather clearly, the essence of avoiding the featherbedding provision is for the payment of wages to a person who performs work for the benefit of the employer and, in consideration, is paid only once. The payment of ongoing wages of $50,000.00 a year to union officials who perform no ongoing work for Caterpillar fails this test. App. at 79a. This distinction is especially important, because unlike a pension payment to a former worker, the union insists that it can bargain for specific wage increases for its union officers (who are former Caterpillar employees) as often as it wishes. *Id.* Yet, wage increases have to relate to work "to be

performed" for the employer under Section 8(b)(6) as Senator Taft explained. The "wages" the union seeks here are not for the performance of any work for Caterpillar, but are for the benefit of the union membership in reduced salary payments for union officers. The Third Circuit would adopt the reasoning of the President's veto message that a union contract exempts violations.

The history of the Act set forth above was examined by this Court in *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100 (1953). There, Court found that limited "bogus" work actually performed by employees was not featherbedding prohibited by the Act because the statutory "condemnation" is limited to "instances where a labor organization or its agents exact pay from an employer for services not performed." *Id.* at 110. Because the extra (unneeded) work was indeed performed by the *employees* in *American Newspaper*, the practice was found not prohibited.[4] Here, there is no work that can be performed by full-time union officials for Caterpillar, not even the make-work that this Court had accepted in *American Newspaper*.[5]

---

[4]Three members of the Court dissented. Justice Douglas found the practice "not only unwanted, it is indeed wholly useless....In no sense that I can conceive is it a 'service' to the employer....No matter how time-honored the practice, it should be struck down if it is not a service performed for an employer." 345 U.S. at 112. Mr. Justice Clark and Chief Justice Vinson also dissented and concluded that: "[a]n interpretation of 'services' in § 8(b)(6) to exclude contrived and patently useless job operations not to the employer's benefit could effectuate the legislative purpose." *Id.* at 115.

[5]The Third Circuit also makes the off-hand reference to employer payments for coterminous jury duty and National Guard service that employees might receive as if they are equivalent activities which demonstrate why the payments to full-time union officials should continue. App. 9a. The reasoning of the court of appeals is not supported by the references. In both instances, the call to jury duty and the call to active duty in the armed forces is an involuntary one for which the employee is compelled to serve on penalty of imprisonment. In both cases, the term of service is very short. For jury duty it is from one day to several weeks. For National Guard service it is for two weeks per year and one weekend a month. In both cases, the government releases the worker back to his/her full-time employment. Both fulfill citizenship duties that employers are

(continued...)

Congress did not find its 1947 prohibitions entirely sufficient. In the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), the Congress amended Section 302 to strengthen its financial prohibitions and to establish the validity of a cause of action against union officers for conflicts of interest. 29 U.S.C. § 440. Specifically, the LMRDA required union officers to file a report with Secretary of Labor each year detailing" any income or any other benefit with monetary value (including reimbursed expenses) which he...derived directly or indirectly from, an employer whose employees such labor organization represents...." 29 U.S.C. §432(a). *See* Analysis of the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare (Sept. 10, 1959), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE OF 1959, at 947, 951 (1959) (identifying requirement to report any "'conflict of interest' transactions, and any income or other benefits with monetary value derived therefrom.").

This Analysis also explained that legitimate payments under Section 302 is "by an employer to any of his employees as compensation for their services as employees." *Id.* at 962. It also identifies a distinction between payment "as compensation for, or by reason of, his services as an employee" with "payments to trust funds for the purpose of pooled vacation, holiday, severance, or similar benefits or defraying costs of apprenticeship or other training programs." *Id.* at 963. This difference is important since the concept of deferred benefits was not intended to apply to the "by reason of" language used in Section 302(b). Hence, "compensation" for contemporaneous services rendered "as an employee" are permitted, while health and welfare and "similar" *deferred* group benefits may also be paid. The payments to union officials here fits

---

[5](...continued)
compelled to support and receive the benefit of better trained personnel from the military service and more experienced workers from jury duty service to the community. To encourage both activities, an employer may provide supplemental income to these employees on their short tours of governmental service. Financial support for full-time duty in the service of the private labor organization (its antagonist), is entirely different.

neither category (wages or shared group benefits) and therefore are not permitted by express terms of the Act.

If the case below stands, the scenario of this case could result in a nationwide practice. In many respects it is indistinguishable from a case under the Act like *United States v. Gruttadauro*, 818 F.2d 1323 (7th Cir. 1987). There, the employer paid union business agent Gruttadauro for five union cards over a period of years to fend off unionization by other unions. In the meantime, the employer did not sign any agreement with the Laborers' Union that Gruttadauro represented or did Gruttadauro provide the employer with any employee services. Mr. Gruttadauro was convicted for violating Section 302(b)(1) of the Act.

The problem presented by the decision below is establishing the point where and when an employer can be forced to pay wages for full-time union officials. Removal of the "bright line" by the Third Circuit introduces innumerable permutations and uncertainty. Must former employees have worked for the employer when a special clause permitting future officer payments was first adopted? Must the official actually have been an employee of the employer? For how long? Apply one day, get hired, and then quit the next?[6] Can the union and employer agree to make these payments in its first collective bargaining contract with union officials? Does the agreement have to be in a collective-bargaining agreement at all or may it be contained in one of thirty private side-letters. Petition at 26 n.37. Will such side-agreements be made public to the bargaining unit?

Because the Third Circuit used the "by reason of" language to validate these payments, the entire statutory purpose behind Section 302(c)(1) can now easily be sidestepped. The strong national interest in strict prohibition of employer money flowing into the pockets of elected union officials caused a legislative veto override in order to ensure union loyalty to workers. That specific national

---

[6]*See NLRB v. Town & Country Elec., Inc.* 116 S. Ct. 450 (1995) (union officials protected by Section 7 to apply for work as employees).

goal is jeopardized by the ruling below that fails to serve the legislative goal that rejected the President's veto terms.

Accordingly, this case presents the Court with an opportunity to further clarify and strengthen the purpose of Sections 302 and 8(b)(6) of the Labor Act and to resolve the conflict in the Circuit Courts represented by the opinion of the Third Circuit.

II. THE CONCEPT THAT ALL BARGAINING UNIT EMPLOYEES TRADED PAST ECONOMIC BENEFITS FOR POSSIBLE FUTURE WAGE PAYMENTS AS A UNION OFFICIAL IS A LEGAL FICTION THAT MUST BE DISAVOWED BY THE COURT TO VINDICATE THE PURPOSE OF SECTION 302(c)(1)

The Third Circuit supports its revolutionary decision under Section 302 of the Labor Act by arguing that there had been an economic trade by all unit employees for the "promise that, if he or she could someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary." App 10a.

The error in this reasoning is highlighted by Judge Mansmann in her dissent. It is important to recognize that the Third Circuit majority's statement is inherently illogical because it fails to identify the fact that the Union is but a majority bargaining representative. Therefore, whenever the Union attempts to provide itself with direct benefits, it knows that the non-union members of the bargaining unit will not be able to vote to approve the contract and therefore to object to the provision. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

Furthermore, no non-union member of the bargaining unit can ever be elected a union official. Thus, to argue that the trade-off of current wages and benefits was made to secure the promise of payments by Caterpillar if the employee became an elected official is not a convincing possibility.

Yet, the Third Circuit majority's reliance on this trade-off implicates the union's duty of fair representation toward the non-

member employees who receive no possible benefit from a wage transfer to union officials. Since the Third Circuit called these payments a "benefit," App. 10a, they must be examined as a charge against employees just as much as union dues are chargeable and for which objecting non-union employees have the right to seek a reduction in forced union dues.

Moreover, this type of bargaining activity poses serious questions under the Union's duty of fair representation. In trading off union salary amounts that would otherwise be apportioned to collective bargaining activities against union dues (to be paid by objecting agency fee payers from their take-home wages), the union proportionally increases the amount of support it receives from agency fee payers to support collective bargaining activities by hiding their "contributions" in the union officer's pay provision.

In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) ("Beck"), the Court found that a union violates the duty of fair representation not only when it *expends* money on purposes unrelated to collective bargaining, but when it exacts and *collects* full union dues: "§8(a)(3) . . . authoriz[es] the collection of only those fees necessary to finance collective bargaining activities." *Beck*, 487 U.S. at 759 (1988).

The Third Circuit confounds the essence of the fair representation obligation by stating that the act of negotiating direct union salary benefits from the employer, as well as a union security clause requiring all members to pay union dues and initiation fees, is lawful under the terms of Section 8(a)(3). It must further accept the proposition that the negotiation of union officer salary compensation cannot be accomplished in an arbitrary, discriminatory or bad faith manner constituting a breach of its duty of fair representation.

This Court in *Beck* used express language to state that not only is the duty of fair representation violated when a union "exacts" money in excess of germane collective bargaining expenses, *Beck*, 487 U.S. at 759, but it is a per se violation of *Beck* and § 8(a)(3) to exact more. Since Section 8(a)(3) is an employer violation of the Act, *amicus curiae* reads § 8(a)(3) as prohibiting the employer from

agreeing (or conspiring) with the union to violate the Act. Caterpillar has properly reassessed its past activities and chosen to cease engaging in violations of the Labor Act and interference with employee rights.

In fact, the activities for which compulsory unionism is permitted to defray expenses are those found in § 8(d) of the NLRA. The *Beck* Court repeatedly emphasized the requisite nexus between collective bargaining contracts and the cost chargeable under the statute:

> The statutory question presented in this case, then, is whether [§ 8 (a)(3)] includes the **obligation to support** union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. *We think it does not*.[7]

> We conclude that § 8 (a) (3) . . . authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[8]

The mere act of negotiating union salary payments and a union security clause, like that found in the parties former agreements, also does not consider the fair representation claim. *Amicus curiae* respectfully submits that by negotiating the union salary clause as well as a union security clause, and demanding and obtaining dues and fees from objecting non-union employees under threat of discharge, the UAW violates its statutory duty of fair representation owed to those objecting employees.

When this argument is correctly understood, the Center submits that the Unions' actions are not only *arbitrary, discriminatory and in bad faith*, as a matter of law, but also contrary to the Unions'

---

[7]*Beck*, 487 U.S. at 745 (emphasis added.).

[8]*Beck*, 487 U.S. at 762-63.

exclusive bargaining agent responsibilities "to serve the interest of all members without hostility ... and to exercise its discretion with complete good faith and honesty ...." *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967). A duty to represent employees fairly with respect to statutorily defined activities necessarily implies a duty not to represent them otherwise. For an assertion of non-existent representational powers is always "unfair," or discriminatory, and arbitrary; and inferentially motivated by bad faith.

By demanding that plaintiffs pay through reduced wages more than their fair share of official union costs, the unions divert non-objecting employees' money from the "collective bargaining budget" to the union's "institutional budget." *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963)(NLRA case); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961)(an RLA case). Thus, "[b]y paying a larger share of collective bargaining costs [plaintiffs] subsidize the union's institutional activities" and diminish their own expression. *Schermerhorn*, 373 U.S. at 754. This result is a perversion of § 8(a)(3) just as it is a perversion of § 2, Eleventh in the RLA setting. *See Lykins v. Aluminum Workers International Union*, 510 F. Supp. 21, 26-27 (E.D.Pa. 1980)(§ 8(a)-(3) condemns expenditure of dissenters' money for ideological purposes).

In *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), the Court faced the question whether an exclusive representative could discriminate against nonunion employees. The Court readily found "governmental action" sufficient to raise constitutional issues: "For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitation on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."

The questions were avoided by statutory construction there. Here, under the Third Circuit's construction, adopted in *Beck*, the Court faces the issue. The Court in *Steele* concluded that the Act,

> imposes on the ...representative...*at least* as exacting a duty to protect equally the interests of the members of the craft *as the Constitution* imposes upon a legislature to give equal protection to the interests of those for whom it legislates. *Congress has seen fit to clothe the representative with powers comparable to those possessed by a legislative body* both to create and restrict the rights of those whom it represents, ...but it has also imposed on the representative a corresponding duty. *Id.* at 202 (emphasis added).

These issues play a significant role under the Labor Act and protect the guaranteed right of employees under Section 7 of the Act to voluntarily choose their union membership. However, when they are forced to subsidize union salaries by direct reduction of their potential wage gains, rather than through proof of the union's cost of collective bargaining, their voluntary "membership" rights are undermined. These interests deserve to be considered fairly by the Court. The lack of consideration by the court majority below presents a grave threat to the Statute heretofore protected by this Court.

CONCLUSION

WHEREFORE, for the important reasons set forth above, the Center on National Labor Policy, Inc., respectfully requests that this Honorable Court grant the Petition for the purpose of reversing the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MICHAEL E. AVAKIAN
CENTER ON NATIONAL LABOR
POLICY, INC.
5211 Port Royal Rd., Suite 103
No. Springfield, VA 22151
(703) 321-9180

Dated: August 6, 1997

Counsel of Record for *Amicus Curiae*